

APR 27 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
October Term, 1982

DELAWARE RIVER BASIN COMMISSION, ET AL,
Respondent,

v.

BUCKS COUNTY WATER AND SEWER AUTHORITY,
Petitioner.

On Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit
(Third Circuit Court No. 82-1233)

**BRIEF IN OPPOSITION OF INTERVENOR
STATE OF NEW YORK TO THE PETITION
FOR A WRIT OF CERTIORARI**

For the State of New York

ROBERT ABRAMS
Attorney General

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

BERYL KUDER
Assistant Attorney General

NANCY STEARNS*
Assistant Attorney General
Environmental Protection Bureau
2 World Trade Center
New York, New York 10047
(212) 488-7560

* Counsel of Record

April 1983

Question Presented

Does the challenged classification which exempts pre-1961 Delaware River Basin users from certain water charges comport with the Equal Protection Clause as a rational means of promoting legitimate purposes of the Delaware River Basin Compact?

TABLE OF CONTENTS

	PAGE
Question Presented	I
Statement of the Case	1
Proceedings Below	1
The Decision of the District Court	3
Summary of Argument	6
Argument Why Certiorari Should Be Denied	6
The Judgment That the Classification Is a Rational Means of Furthering the Legitimate Goals of the Compact Fully Comports With This Court's Equal Protection Holdings and Is in All Respects Proper	6
Conclusion	10

TABLE OF AUTHORITIES

PAGE

Cases:

Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371 (1978)	7
City of New Orleans v. Dukes, 427 U.S. 297 (1976)	6, 8
DRBC v. BCWSA, 641 F. 2d 1087 (3rd Cir. 1981)	2
DRBC v. BCWSA, 474 F. Supp. 1249 (E.D. Pa. 1979)	2
DRBC v. BCWSA, 545 F. Supp. 138 (E.D. Pa. 1982) <i>passim</i>	
Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974)	8
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, <i>rehearing denied</i> 450 U.S. 1027 (1981)	4, 8
New Jersey v. New York, 347 U.S. 995 (1954)	4
Shapiro v. Thompson, 394 U.S. 618 (1969)	8
Stanley v. Public Utilities Comm., 295 U.S. 76 (1935)	9
United States v. Maryland Savings Share Insurance Corp., 400 U.S. 4 (1970)	9
U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973)	5

Delaware River Basin Legislation:

Delaware River Basin Compact	
§ 1.3(e)	3, 4, 7
§ 15.1(b)	2, 3, 4
Delaware River Basin Commission Resolutions	
74-6	1, 2, 3, 4
74-6 § 5-2.1(d)	5

No. 82-1515

IN THE
Supreme Court of the United States
October Term, 1982

DELAWARE RIVER BASIN COMMISSION, ET AL.,
Respondent,
v.

BUCKS COUNTY WATER AND SEWER AUTHORITY,
Petitioner.

**On Writ of Certiorari to the United States Circuit
Court of Appeals for the Third Circuit
(Third Circuit Court No. 82-1233)**

**BRIEF IN OPPOSITION OF INTERVENOR
STATE OF NEW YORK TO THE PETITION
FOR A WRIT OF CERTIORARI**

Statement of the Case

Proceedings Below

This action was commenced by respondent Delaware River Basin Commission (DRBC) in 1977 to collect water-use charges, imposed pursuant to DRBC Resolution 74-6 (A. 134), from petitioner Bucks County Water and Sewer Authority (Bucks County) for water withdrawn from the

Delaware River Basin by the City of Philadelphia and sold to Bucks County. The District Court granted summary judgment for the DRBC holding that Resolution 74-6 which imposed the water-use charges generally but exempted certain users having a "legal entitlement" to take water from the Delaware River Basin in 1961 was not in violation of the Constitutional guarantee of equal protection. *DRBC v. BCWSA*, 474 F. Supp 1249 (E.D. Pa. 1979) (A. 57).

Bucks County appealed from the District Court's decision. The Court of Appeals for the Third Circuit determined that it did not have sufficient information to uphold the water-use charges on equal protection grounds; and it vacated the grant of summary judgment and remanded the case to the District Court in order to allow the DRBC an opportunity to "proffer some purpose that the court may reasonably presume to have motivated the Congress that added § 15.1(b) to the Compact [the section authorizing the exemption from water-use charges found in Resolution 74-6] [and which will be] a standard against which to test the rationality of Resolution 74-6." *DRBC v. BCWSA*, 641 F. 2d 1087, 1100 (3rd Cir. 1981) (A. 27, 52). The Third Circuit also suggested that the District Court encourage member States of the DRBC and current users of the River's waters to intervene in the proceedings in order to develop a full record (A. 52). Respondent New York State is one such intervenor. On remand, plaintiff DRBC and intervenor-plaintiffs moved for summary judgment; and in an order dated March 26, 1982 (A. 3), and for reasons set forth in an opinion dated June 30, 1982, *DRBC v. BCWSA*, 545 F. Supp. 138 (E.D. Pa. 1982) (A. 4), the District Court again granted summary judgment for plain-

tiffs, upholding the constitutional validity of Resolution 74-6. In a Judgment Order dated January 6, 1983, the Third Circuit affirmed the judgment of the District Court (A. 2).

The Decision of the District Court

In its decision, the District Court carefully reviewed the terms and the legislative history of the Delaware River Basin Compact (Compact) (A. 75). It identified essentially two proper governmental purposes which were served by § 15.1(b) of the Compact (A. 124) and its implementing regulation, Resolution 74-6,* which we will refer to collectively as the classification. Initially, the court recognized that the classification was a limitation on the DRBC's rate-making power which assured that those entities with legal rights to withdraw water from the Delaware Basin prior to the formation of the Compact could continue to exercise those rights without charge (A. 13-14). The court keyed the propriety of this legislative purpose into the language of § 1.3(e) of the Compact which states that "In general, the purposes of this compact are . . . to encourage and provide for the planning, conservation, utilization, development, management and control of the water resources of the basin" (A. 87) and concluded that "the Compact's authors evidently considered it necessary to preserve expressly the pre-1961 users' privilege of free water use so that the fledgling Commission's chances of winning the cooperation of existing users [whose information and expertise were likely

* Earlier, the court stated that the only question before it was the constitutionality of Resolution 74-6 because the constitutionality of § 15.1(b) was "not challenged in the Court of Appeals and [is] not open to challenge here." (A. 22-23).

to be necessary to the DRBC's early efforts to perform its functions] would be increased." (A. 14).

The court also found that a corollary purpose of the classification was the protection of the significant reliance interests of those who had established rights to draw water free from the Basin at the time of the formation of the Compact. This, too, the court tied into one of the stated purposes of the Compact: "to make secure and protect present development within the State"* (Compact § 1.3[e]) (A. 16). Noting that it would be difficult to measure with precision the full extent of the reliance interests, the court held that it was a fair inference that these interests extended beyond the levels of actual water use at the time of the formation of the Compact to include substantial reliance on the users' full " 'legal entitlement'—defined by Resolution 74-6—as of the Compact's enactment." (A. 16). This was because users would no doubt have engaged in maintenance and expansion activities based on their needs and expectations as to the free availability of water (A. 16-17). The court found that protecting such *in situ* interests from the burdens and dislocations of new regulatory schemes is a recognized proper governmental purpose, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, *rehearing denied* 450 U.S. 1027 (1981) (A. 17).

* The court also noted that an additional effect of § 15.1(b) was "to preserve in *status quo ante* the entitlement of all pre-Compact users to withdraw water without charge on a parity with the rights to free use of New Jersey and New York City that were secured by the 1954 Consent Decree (*New Jersey v. New York*, 347 U.S. 995) and confirmed in § 3.5 of the Compact." (A. 14). We point out here that this effect appears to comport with the purpose of the Compact "to apply the principle of equal and uniform treatment to all water users who are similarly situated . . . , without regard to established political boundaries." (Compact, § 1.3[e]).

Because the Third Circuit had expressed reservations about the seeming permanent character of the exemptions created by the classification, the District Court carefully addressed this issue. It found that because § 5-2.1(d) of Resolution 74-6 (A. 138) prohibits the transfer of free water use rights, it was likely that a significant number of pre-1961 withdrawals will not be perpetually exempt because as the pre-1961 users go out of existence they will be succeeded by new users who will not be permitted to acquire the exemption (A. 21-22). The court did recognize that some users, such as municipalities, are likely to exercise a permanent exemption and that insofar as the classification authorizes this, "it must be carefully reviewed." (A. 22). After such careful review, the court found that the classification exhibited the constitutionally required rationality, for it "does not treat identical groups differently, but rather establishes a financing scheme which respects two significant distinctions between those groups: First, it acknowledges the extent to which the cooperation of existing users was necessary to the early period of DRBC's work; and, secondly, it recognizes the different degree of reliance interest in free water use." (A. 23). Thus, "the classification . . . is not one that is 'wholly without any rational basis,' *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 538 (1973)." Instead, "this classification appears to help promote the general goals of the Compact . . ." (A. 23).

Summary of Argument

The sole issue here is whether the challenged classification is rationally related to proper purposes of the Compact. The exemption from rate charges of pre-1961 Basin users was designed to foster the cooperation of these users in the early, formative work of the Commission and to guard against economic dislocation by protecting the reliance interests of these users on their established rights to free Basin water. These are legitimate purposes of the Compact, and the classification is a rational means of advancing them. The classification, therefore, comports fully with the requirements of the equal protection clause.

Argument Why Certiorari Should Be Denied

The Judgment That the Classification Is a Rational Means of Furthering the Legitimate Goals of the Compact Fully Comports With This Court's Equal Protection Holdings and Is in All Respects Proper.

There is no question that the rational basis test is the applicable standard for judging the classification at issue here. When that is the test, this Court has said that courts should "defer[] to legislative determinations as to the desirability of particular statutory discriminations. (citation omitted) . . . [and] presume the constitutionality of [such determinations] and require only that the classification challenged be rationally related to a legitimate state interest . . . [And] in the local economic sphere, it is only the invidious discrimination, the whole arbitrary act, which cannot stand consistently with the Fourteenth Amendment. (citation omitted)." *City of New Orleans v. Dukes*, 427 U.S. 297, 303-304 (1976).

As discussed above, the District Court found that at least two legitimate state (Compact) interests were served by the classification: encouragement of cooperation from pre-1961 users whose information and expertise were deemed important assets to the early efforts of the DRBC and the protection of the significant reliance interests of those users who had established rights to draw water free from the Basin at the time of the formation of the Compact. Petitioner does not really question the fact that the rate classification advances both of these interests, but rather focuses its argument on the question of the legitimacy of these governmental purposes.

As to the purpose of eliciting cooperation, petitioner attempts to characterize this as an impermissible political compromise and cites *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 391-392 (1978), for the proposition that a "State's need or desire to engender political support . . . cannot by itself justify an otherwise invidious classification." *Baldwin*, however, held that "the classification utilized in Montana's licensing scheme is not 'otherwise invidious discrimination.'" (at 392 n.24).

New York does not believe that the cooperative effort that the DRBC sought and believed necessary to achieve from affected user groups "for the planning, conservation, utilization, development, management and control of the water resources of the basin" (Compact §1.3[e]) is the type of general and popular political support deemed questionable in *Baldwin, supra*. In any event, this purpose of the classification does not stand "by itself" and is not "otherwise invidious" (*Baldwin, supra*).

Two other cases which have indicated that the desire to engender political support could not sustain an otherwise invidious classification are *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) and *Shapiro v. Thompson*, 394 U.S. 618 (1969). The issue in both of these cases involved durational residency requirements which conditioned the receipt of certain medical and welfare assistance, respectively. The residency requirements were held to affect the fundamental constitutional right of interstate travel and in both cases, because compelling state interests were not shown, were struck down. The classification here does not affect the exercise of fundamental constitutional rights, and there is nothing inherently invidious about it. All parties concede that a showing of a compelling state interest is not necessary to sustain it.

In this context, it is important to recognize that the classification also has as a purpose the protection of the reliance interests of pre-1961 Basin users. Thus, even regardless of questions about the merits of the purpose of ensuring cooperation, that latter purpose does not stand "by itself" as the basis for the legislation. In the economic sphere, contrary to what petitioner argues, protecting reliance interests and guarding against "serious economic and political dislocations" (A. 17) are legitimate and proper governmental purposes. In *Minnesota v. Clover Leaf Creamery, supra*, 449 U.S. at 466-468, this Court recognized the validity of a legislative determination banning a new, not yet established, method of milk packaging and permitting the continuance of an older method, thereby avoiding the severe economic dislocation of a total ban. Similarly, in *New Orleans v. Dukes, supra*, 427 U.S. at 305, the Court

upheld an ordinance banning street vendors generally but grandfathering certain older, more established vendors, stating that the City could "reasonably" recognize the "substantial reliance interests" of the older vendors.

As noted above, the classification here may involve some, though limited, permanency. A permanent classification, however, does not *per se* violate the equal protection clause. In *United States v. Maryland Savings Share Insurance Corp.*, 400 U.S. 4 (1970), the Court upheld an income tax exemption limited to certain nonprofit insurers organized prior to a specified date. The legislative rationale was that an extension of the exemption could lead to a proliferation of insurance companies which could interfere with the operations of certain federal institutions. In *Stanley v. Public Utilities Commission*, 295 U.S. 76 (1935), the Court upheld a Maine statute requiring common carriers to obtain certificates of public convenience and necessity and granting, automatically, such certificates to carriers which had provided service prior to a specified date. The Court found that the legislature could reasonably have determined "as of what period the service of carriers for hire over its highways did not impair their use or cause congestion, and require[d] certificates for those seeking to supply additional transportation for a later period." (p. 78). Both of the above cases, we submit, are directly analogous to this one, for they involved classifications which had the potential to grandfather permanently certain economic entities engaged in business prior to the need for and existence of the regulation at issue. Just as the Court upheld their validity, it should recognize the validity of the classification here.

In conclusion, the classification is rationally related to legitimate and legally recognized governmental interests and, therefore, comports fully with equal protection requirements.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: New York, New York
April 1983

Respectfully submitted,

For the State of New York

ROBERT ABRAMS
Attorney General

PETER H. SCHIFF
Acting Attorney in Chief
Appeals and Opinions

BERYL KUDER
Assistant Attorney General

NANCY STEARNS*
Assistant Attorney General
Environmental Protection Bureau
2 World Trade Center
New York, New York 10047
(212) 488-7560

* Counsel of Record